



California Corporate & Securities Law

The Commissioner's Precedent Decisions – Another Route To Rulemaking?

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The Commissioner of Corporations may issue desist and refrain orders under the Corporate Securities Law of 1968. Cal. Corp. Code § 25532. If the respondent wishes to contest the order, s/he must do so by filing a request for hearing within 30 days of service of the D&R order. A hearing must then be held under the formal adjudication provisions of the California Administrative Procedure Act. An Administrative Law Judge will then issue a proposed decision that the Commissioner may or may not adopt.

To what extent, can the Commissioner rely on adopted decisions as precedent in subsequent hearings? The legislature amended the APA in 1995 to permit the Commissioner (and other state agencies) to designate ALJ decisions as precedent decisions. Cal. Govt. Code § 11425.60(a). The Commissioner, moreover, is prohibited from relying on a decision as precedent unless that decision has been designated as a precedent decision. Cal. Govt. Code § 11425.60(b).

Interestingly, the legislature has expressly provided that designation of a decision as a precedent decision is not rulemaking subject to the notice, comment and review provisions of the APA. Further, the decision to designate a decision is not subject to judicial review. Thus, precedent decisions can represent an end-run on the rulemaking provisions of the APA.

Commissioners have used this authority relatively sparingly. Only eight decisions have been designated and only three of the designated decisions involve the CSL. Copies of the Commissioner's precedent decisions are available on the Department of Corporations' [website](#).

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